THE LIMITS
OF THE
CRIMINAL SANCTION

HERBERT L. PACKER

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Preface

THIS BOOK is an essay rather than a treatise. Whatever usefulness it has does not reside in the learning that it collects. Accordingly, I have avoided the usual compromise between scholarly care and printing costs, which dictates that reference notes be scrupulously assembled and then relegated to the back of the book. Instead I have used footnotes, very sparingly, to provide easy reference to specific quotations or citations in the text, and have written a single bibliographical note (pp. 369–75) to provide a map of the intellectual terrain.

I have accumulated more obligations in the writing of this book than can easily be acknowledged. Some of them are stated in the bibliographical note. For others, especially those incurred when friends and colleagues undertook to criticize part or all of the manuscript, I have to thank Gerald Gunther, John Kaplan, Yosal Rogat, Michael Wald, and especially Sanford Kadish. Grants from the Rockefeller Foundation and the American Council of Learned Societies made possible a year of rumination about the themes of this book, a year that was made memorable by the hospitality of the Dean and Faculty of the University of Pennsylvania Law School. I also wish to thank the Ford Foundation for a grant to the Stanford Law School that helped me finish this book and that is supporting continued inquiry into the problems with which this book is concerned.

My secretary, Peg Dickson, has typed and retyped the manu-

script with efficiency and good cheer. The students in my seminar on The Criminal Sanction, Autumn Term 1967, gave the manuscript and its author the kind of redoubtable working over that is both justification and reward for a law teacher's existence. And my friends at the Stanford University Press—Leon Seltzer, Jess Bell, and Elinor Stillman—demonstrated again what scholarly publishing at its best is all about. In short, whatever others can do has been done superbly.

Portions of the book have appeared, in somewhat different form, in *The American Scholar, The Supreme Court Review,* and *The University of Pennsylvania Law Review.* I am grateful to the editors of these periodicals for their editorial assistance as well as for permission to reprint.

My colleagues in the School of Law and in the administration of the University have been patient and tolerant during the gestation. I suspect that they will be as relieved as I by the delivery. My most important debt, happily undischargeable, is acknowledged in the dedication.

H.L.P.

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Introduction: The Argument and Its Audience

THIS IS A BOOK about law and some related subjects; but it is not a specialized book, and I hope that it will be read by people who are not specialists. It is a book about a social problem that has an important legal dimension: the problem of trying to control antisocial behavior by imposing punishment on people found guilty of violating rules of conduct called criminal statutes. This device I shall call the criminal sanction. The rhetorical question that this book poses is: how can we tell what the criminal sanction is good for? Let us hypothesize the existence of a rational lawmaker—a man who stops, looks, and listens before he legislates. What kinds of questions should he ask before deciding that a certain kind of conduct (bank robbery, income tax evasion, marijuana use) ought to be subjected to the criminal sanction?

Some people argue that we ought never subject lawbreakers to criminal punishment. Such punishment, they say, is a vestige of our savage past that we ought to abandon in favor of more benign measures of social control, measures that do not involve us in cruelty to our fellow man. Others argue that any act treated by the law of God or Man as being immoral may be properly subject to the criminal sanction. I think both are wrong, although the danger of the moment is that we will overuse the criminal sanction, not that we will abandon it. But both errors need to be combated.

The argument of this book begins with the proposition that

there are certain things we must understand about the criminal sanction before we can begin to talk sensibly about its limits. First, we need to ask some questions about the rationale of the criminal sanction. What are we trying to do by defining conduct as criminal and punishing people who commit crimes? To what extent are we justified in thinking that we can or ought to do what we are trying to do? Is it possible to construct an acceptable rationale for the criminal sanction enabling us to deal with the argument that it is itself an unethical use of social power? And if it is possible, what implications does that rationale have for the kind of conceptual creature that the criminal law is? Questions of this order make up Part I of the book, which is essentially an extended essay on the nature and justification of the criminal sanction.

We also need to understand, so the argument continues, the characteristic processes through which the criminal sanction operates. What do the rules of the game tell us about what the state may and may not do to apprehend, charge, convict, and dispose of persons suspected of committing crimes? Here, too, there is great controversy between two groups who have quite different views, or models, of what the criminal process is all about. There are people who see the criminal process as essentially devoted to values of efficiency in the suppression of crime. There are others who see those values as subordinate to the protection of the individual in his confrontation with the state. A severe struggle over these conflicting values has been going on in the courts of this country for the last decade or more. How that struggle is to be resolved is a second major consideration that we need to take into account before tackling the question of the limits of the criminal sanction. These problems of process are examined in Part II.

Part III deals directly with the central problem of defining criteria for limiting the reach of the criminal sanction. Given the constraints of rationale and process examined in Parts I and II, it argues that we have over-relied on the criminal sanction and that we had better start thinking in a systematic way about how to adjust our commitments to our capacities, both moral and operational.

It is, perhaps, too bad that there is no branch or department of human inquiry to which this book may be safely assigned. It draws on law, on philosophy, on economics, and on some of the behavioral sciences, but it does not pretend to be a technical treatise about any of them. In that sense, it is somewhat old-fashioned. Scholars today are supposed to stick closer to their lasts than was expected of them in the days when we knew less, but knew it about more. The book is somewhat old-fashioned also in that it seeks to apply utilitarian principles to larger problems than those that today seem to interest most professional philosophers. In both substance and method the shades I invoke, not without presumption, are those of Bentham and Mill.

The timeliness of an inquiry into the limits of the criminal sanction hardly needs emphasis. We live today in a state of hyperconsciousness about the real or fancied breakdown of social control over the most basic threats to person and property. "Crime in the streets" is something that we seem unable to cope with. At the same time, and with the same limited resources, we wage ever-more-dubious battle against the use of narcotics, marijuana, and a host of new dangerous drugs. Is there anything that can be said, beyond a simplistic expression of personal bias, about our wide use of the criminal sanction? Are there rational arguments to which rational men can respond rationally? This seems to me to be an important question, and this book is an attempt to give it an affirmative answer.

In the end, this is an argument about the uses of power. The criminal sanction is the paradigm case of the controlled use of power within a society. It raises legal issues that are too important to be left to the lawyers, philosophic issues that are too important to be left to the philosophers, and behavioral science issues that are too important to be left to the behavioral scientists. That is why the argument is addressed, with affectionate respect, to the Common Reader.

PART I

RATIONALE

CHAPTER ONE

The Dilemma of Punishment

TODAY AS ALWAYS the criminal law is caught between two fires. On the one hand, there is the view that punishment of the morally derelict is its own justification. On the other, there is the view that the only proper goal of the criminal process is the prevention of antisocial behavior. As if the problem of reconciling these views were not enough, the second has lately given rise to a new formulation that threatens the very foundations of the criminal law. This new formulation seemingly creates a dilemma for those who do not accept the retributive position yet who do not want to reject the whole concept of the criminal law. In this chapter I will briefly sketch the outlines of this alleged dilemma, and will indicate a way of dealing with the issues it raises. Later I will explore these issues more fully, and will essay an integrated rationale that favors neither punishment for the sake of punishment nor the complete abolition of punishment.

The retributive position is an old one, and its content has not changed much over the centuries. It holds, very simply, that man is a responsible moral agent to whom rewards are due when he makes right moral choices and to whom punishment is due when he makes wrong ones. According to this view, these imperatives flow from the nature of man and do not require—indeed do not permit—any pragmatic justification. There is a perceived sense of fitness in the sight of wrongdoers being made to suffer for their misdeeds. As individuals we have a wholly proper desire to seek revenge when wrongs are inflicted on us; as a society we demand